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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner a commercial fisherman and owner of a fish processing plant in Gulf County, Florida, received a Federal permit to catch redfish (red drum) by the use of purse seine under the provisions of an emergency rule issued by the National Marine Fisheries Service on June 30, 1986, pursuant to the authority provided in §305(e)(1) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. §1885(e)(1)). Petitioner, pursuant to the Federal red drum permit and with a Federal observer aboard his vessel, took a large amount of red drum in the waters of the Exclusive Economic Zone of the United States off of the coast of Louisiana. The fish were landed in Louisiana and then trucked to Petitioner's fish processing plant in Port St. Joe, Florida. The Petitioner (and others) was then arrested and the fish were confiscated. The Petitioner was charged with violating FLA. STAT. §370.08(3), which makes it illegal to take food fish within or without the waters of Florida with the use of a purse seine and seeks to prohibit the possession of food fish so taken. The question presented is that, under the circumstances, was the Petitioner deprived of rights protected by the:

1. Supremacy Clause of Article VI of the United States Constitution in that the Petitioner was arrested under the authority of State Law for activities which were expressly legal pursuant to Federal Statutory Law, Rules, and Regulations;

2. Privileges and Immunities clauses of the United States Constitution, Article IV, Section 2, Clause 2 and of

QUESTION PRESENTED - continued

the Fourteenth Amendment to the United States Constitution, in that the Petitioner was arrested and deprived of his property for the taking and the possession of exclusively Federal fishery resources from the waters of the exclusive economic zone of the United States pursuant to a Federal Law and Regulation then in effect;

3. Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that any United States Citizen, after having sought and received a Federal permit to catch red drum in the United States Exclusive Economic Zone, could catch said fish with impunity as long as those persons chose to possess the fish in any State of the Union with the exception of Florida;

4. Commerce Clause of Article I, Section 8, of the United States Constitution in that the State of Florida arrested the Petitioner and confiscated his catch of red drum which were legally taken, according to Federal Law and Federal Regulation, from the United States Exclusive Economic Zone and which were caught, transported in interstate commerce, and being processed to be sold in interstate commerce;

5. Due Process Clause of the Fourteenth Amendment of the United States Constitution in that the Petitioner was arrested for violation of a state statute and deprived of property, though the statute in question was not reasonably related to the purpose for which it was enacted, nor was enforcement of said statute the least restrictive manner of carrying out the purpose of said statute?

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JURISDICTIONAL STATEMENT

1. The decision of the Supreme Court of Florida, which the Petitioner seeks to have reviewed by this Court, was entered on July 19, 1990. There was no Motion for Re-Hearing filed and thus the decision of the Supreme Court of Florida became final on August 3, 1990 (Fla. R. App. P. 9.330).

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §1257 and the considerations as set forth in Rule 10 of the Rules of the Supreme Court of the United States, specifically the provisions of 1.(b) and 1.(c) of that Rule. Petitioner contends that the decision sought to be reviewed conflicts with the cases of *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *United States v. Florida*, 425 U.S. 791 (1975); *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355 (1986); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *State of Alaska v. F/V "Baranof"*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980); *State v. Sterling*, 448 A.2d 785 (R.I. 1982). Further, this is an important question of Federal law which has not been specifically addressed by this Court.

REPORTS OF OPINIONS

1. The decision of the Supreme Court of Florida in the case of *Raffield v. State* is reported at 565 So.2d 704 (1990).

2. The decision of the District Court of Appeal of Florida, First District, in the case of *State v. Raffield*, is reported at 515 So.2d 283 (1987).

3. The decision of the County Court in and for Gulf County, Florida, in the case of *State v. Raffield*, is unreported but bears the reference citation number 84832-A.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE AND REGULATIONS INVOLVED

Provisions of the United States Constitution:

1. U.S. CONST., Art. I, §8, Cl. 3
2. U.S. CONST., Art. IV, §2, Cl. 1
3. U.S. CONST., Art. VI, Cl. 2
4. U.S. CONST., amend. XIV, §1

Federal Statutory Law Involved:

5. 16 U.S.C. §1801
6. 16 U.S.C. §1812
7. 16 U.S.C. §1851
8. 16 U.S.C. §1852
9. 16 U.S.C. §1855
10. 16 U.S.C. §1856

Federal Regulations Involved:

11. 50 C.F.R. §653, Docket Number 60617-6117

State Statute Involved:

12. Fla. Stat. §370.08(3)

The above cited authorities are set out verbatim in the Appendix hereto.

STATEMENT OF THE CASE

On or about July 1, 1986, the Florida Department of Natural Resources was notified of possible violations of §370.08(3), FLA. STAT., due to the taking of red drum by purse seine in a Florida registered vessel in the Federal waters off of the coast of Louisiana. The Petitioner's fishing vessel, "The Fishermen's Pride", with a Federal Fishery Observer on board, landed a large amount of red drum (in Louisiana) which had been taken by purse seine in the waters of the Exclusive Economic Zone of the United States. The red drum were then trucked to a fish processing plant owned by the Petitioner and located in Port St. Joe, Gulf County, Florida. Upon arrival at Port St. Joe, Florida, the truck drivers and employees of the fish processing plant were confronted by officers of the Florida Marine Patrol and the Petitioner was asked to come down to the plant. Subsequently, the Petitioner, several employees of the fish processing plant, as well as one of the truck drivers, a resident of Florida, were arrested and charged with violating §370.08(3), FLA. STAT. Interestingly, another truck driver, who had also transported the red drum from Louisiana to Port St. Joe, Florida, was never arrested nor charged due to the fact that he was a Louisiana resident. The employees, including the Petitioner, were then formally charged by the State of Florida with violations of §370.08(3), FLA. STAT., and the fish

were confiscated and sold. The Defendants filed a Motion to Dismiss the charges against them on the basis that their arrest by Florida Law Enforcement officers was a violation of rights guaranteed to them by the United States Constitution.

During the period of time that the Defendants' Motion to Dismiss was under consideration, the charges against all Defendants, with the exception of the Petitioner, were dismissed on the basis that the State could not meet their burden of proof "as to the employees of Raffield Fisheries any more than we could meet this burden of proof against a food store, convenience store, or fast food establishment." (letter addressed to the Court from the Office of the State Attorney, 14th Judicial Circuit of Florida, dated September 18, 1986.) *See* Order of David L. Taunton, Gulf County Judge, dated September 25, 1986 as contained in the Appendix hereto.

On September 25, 1986, County Court Judge David L. Taunton, granted the Defendants' Motion to Dismiss, finding that FLA. STAT. §370.08(3) was unconstitutional as a violation of State and Federal due process constitutional provisions and in that it violated the Commerce Clause of the United States Constitution. The Order granting the Defendants' Motion to Dismiss was appealed by the State of Florida to the Florida First District Court of Appeals. After the constitutional issues were fully briefed by the parties, the State Appellate Court reversed and remanded the decision to the County Court and explicitly found §370.08(3) to be constitutional. The Petitioner, Eugene Raffield, then filed a Petition for Writ of Certiorari with the Supreme Court of Florida, with said Writ being granted by that Court. Once again,

all constitutional issues were thoroughly briefed by the parties, with the Supreme Court of Florida approving the result reached by the First District Court of Appeals and expressly declaring valid §370.08(3), FLA. STAT.

The Florida Supreme Court found that " . . . Florida's jurisdiction over Raffield and the red drum he caught in federal waters off Louisiana is plainly authorized . . . " and that "In this instance, the manifest intent underlying the [Florida] statute is to protect food fish, including red drum, from the use of purse seines". Finally, the Florida Supreme Court pointed out that "We also must note that the Statute at issue today does *not* prohibit the importation of food fish, including red drum, obtained from other means . . . under current Florida law, red drum may be sold in Florida, provided it has been harvested by lawful means other than the use of a purse seine." *See* Opinion of Supreme Court of Florida as contained in the Appendix hereto. This Petition followed.

REASONS FOR GRANTING THE WRIT

At the outset, it is the Petitioner's position that a state statute prohibiting the taking of food fish with the use of purse seine *is not* a landing *or* possession law relating to red drum. It is a State attempt to impermissably regulate the Federally approved methods of taking of *all* food fish in the United States Exclusive Economic Zone. The harvesting of federal fishery resources by purse seine was specifically allowed by the Federal Emergency Rule. *All* U.S. fishermen have the *privilege* to use purse seines – and they are *immune* from attempts by

individual states to prosecute such conduct. The use of purse seines in the United States Exclusive Economic Zone was specifically considered and allowed. The Petitioner was covered by Federal Law and Regulation and was subject to further federal "oversight" in the form of a federal agent on board his fishing vessel. In spite of this pervasive Federal regulation of his conduct, the Petitioner was arrested and his property confiscated.

This case deals with a plethora of constitutional issues. At the heart of the matter is the issue of whether a United States citizen's right to harvest an exclusively Federal resource, which is founded under Federal law and Federal regulation, can be abridged by the operation of state law. The Federal questions presented are substantial and the Writ should be granted in order to clear up a very confusing state of affairs which exists as a result of conflicting case law. There is an inherent conflict between federal and state law in this particular area. Failure to grant the instant Writ would affirm the validity of the State of Florida's criminal prosecution of the Petitioner and confiscation of his property for acts specifically allowed by Federal law.

In order to have a complete understanding of the situation now facing the Petitioner, it is necessary to provide this Court with the history of Federal/State conflict in this matter and the manner in which the courts of this Nation have chosen to deal with those conflicts.

Almost fifty (50) years ago, this Court held that in matters affecting their legitimate interests, the individual States could regulate the *conduct* of their citizens on the high seas. This extraterritorial regulation was limited,

however, to situations where there was "no conflict with Federal law". *Skiriotes v. Florida*, 313 U.S. 69 (1941). Four (4) years after this decision, President Truman issued Proclamation Number 2667, asserting Federal ownership of all natural resources from the mean low water of each state to the edge of the Continental Shelf. Pres. Proc. No. 2667, 10 Fed. Reg. 12303, 59 Stat. 884. The case of *United States v. California*, 332 U.S. 19 (1947) upheld the validity of President Truman's Proclamation. This Court held that the United States had *total ownership* and control of the three (3) mile marginal ocean belt of the United States superior to and exclusive of the individual States.

The passage of the *1953 Submerged Lands Act*, 43 U.S.C. 1301, et seq., and the *Outer Continental Shelf Lands Act*, 43 U.S.C. 1331, et seq., constituted the political reaction to President Truman's Proclamation and this Court's decision in *United States v. California*, 322 U.S. 19 (1947). See *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330, 339 (5th Cir. 1978). The respective natural resource rights of the United States and the individual coastal states under the *Submerged Lands Act* and the *Outer Continental Shelf Lands Act* were first decided by this Court in *United States v. Louisiana, et al.*, 364 U.S. 502 (1960). In that case, the Court held that none of the coastal states was entitled to *any interest whatsoever* in the natural resources of the outer continental shelf beyond state boundaries. Eleven (11) years later, this Court was called upon to reaffirm its decision in a case brought against the State of Florida concerning seabed rights. *United States v. Florida*, 403 U.S. 949 (1971). After four (4) years of litigation, the State of Florida entered into a *"Joint Motion for an Entry of a Decree"*. This

Court decreed, *as stipulated by the State of Florida*, that " . . . the State of Florida is not entitled to any interest in . . . " the natural resources underlying the Gulf of Mexico more than three marine leagues from the State's historic coastline. *United States v. Florida*, 425 U.S. 791, 793 (1975).

Immediately after the stipulated decree in *United States v. Florida*, 425 U.S. 791 (1975), Congress enacted the *Magnuson Fishery Conservation and Management Act*, 16 U.S.C. §1801, et seq. Due to the fact that the coastal States were not entitled to *any interest* in the natural resources beyond their boundaries, Congress decreed the United States would exercise exclusive fishery management authority over *all fish* in the Exclusive Economic Zone beyond the States' territorial boundaries. *See* 16 U.S.C. §1801(b)(1) and 16 U.S.C. §1812(1)(2) & (3).

Three (3) years after the passage of the Magnuson Act, the Supreme Court issued its decision in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Court held that the regulation of natural resources by the State, *even within its own borders*, can be done only in a way which is consistent with the basic principle that " . . . our economic unit is the nation." *Id.* at 338. The Supreme Court held specifically that when a wild animal " . . . becomes an Article of Commerce . . . its use cannot be limited to the citizen of one State to the exclusion of citizens of another State." *Id.* at 338. *Geer v. Connecticut*, 161 U.S. 519, 538 (1896).

The Magnuson Act states under "Findings, Purposes, and Policy", 16 U.S.C. §1801, that the Congress seeks to establish a national program for the development of fisheries which are under utilized or not utilized by the

United States Fishing Industry in order to " . . . assure that our citizens benefit from the employment, food supply and revenue which could be generated thereby." 16 U.S.C. §1801(a)(7). Congress also declared its purpose to include the taking of immediate action within a Fishery Conservation Zone within which the United States would assume exclusive fishery management authority over *all* fish. 16 U.S.C. §1801(b)(1). Congress declared its purpose to include the encouragement of the development of fisheries of the United States fishing industry for *United States fishermen*. 16 U.S.C. §1801(b)(6). It was further declared to be the policy of Congress that fishery conservation and management measures would be based upon " . . . the best scientific information available . . . " and would " . . . involve and be responsive to the needs of interested and affected States and Citizens . . . ". 16 U.S.C. §1801(c)(3). Finally, Congress set out national standards for all fishery management measures which include, in part, that "conservation and management measures shall not discriminate between residents of different States." 16 U.S.C. §1851(a)(4).

Finally, we reach the statutory provision of the Magnuson Act with which this Petition primarily deals. In Title 16, U.S.C. §1855(e), the Magnuson Act provides for emergency actions to be implemented when it is found that an emergency exists involving any fishery and Federal intervention is deemed necessary. In this particular instance, pursuant to the aforementioned provision, the Secretary of Commerce determined that an emergency existed with regard to the federal red drum fishery of the Gulf of Mexico. Therefore, a ninety (90) day emergency rule was issued for the period of June 25, 1986 through

September 23, 1986. Under the ninety (90) day emergency rule, the "total directed net harvest" of red drum (redfish) for the EEZ was limited to one million pounds. The emergency rule in its "Background" statement noted that fishing for red drum in the FCZ "is conducted almost entirely with purse seines though other types of net gear may prove equally as effective." The language of the rule went on to state that *"commercial fishermen harvesting red drum in the Gulf of Mexico FCZ have a vested interest in this fishery."* Finally, the rule indicated that:

> "This restriction results in a substantial limitation on red drum harvest. There is *no credible scientific evidence* to support the conclusion that more restrictive limitations in the FCZ are warranted at this time. The chosen total directed net harvest limit strikes a balance between the urgent need to conserve this valuable resource and the need to preserve the economic and social integrity of those interests, both recreational and commercial, that depend upon the resource. Information obtained during the pendency of this emergency rule will better enable the preparation of a Secretarial plan to manage and conserve the resource and *achieve Optimum Yield* (OY) *from the fishery.*" (emphasis supplied)

50 C.F.R. §653 (*See* "Background").

The emergency rule then goes on, in §653.3, to state that: "these regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum." The State of Florida relied on this particular language within the emergency rule in determining that it could validly arrest and charge the Petitioner with a violation of FLA. STAT. §370.08(3). This Florida Statute

makes it a criminal offense to take "food fish" by purse seine "within or without" State waters or possessing "food fish" taken by purse seine.

It must be pointed out that FLA. STAT. §370.08(3) is not a landing law nor a law which prohibits the possession of red drum. It is a statutory scheme which impermissably prohibits the taking or possession of "food fish" taken in Federal waters by a method (purse seine) specifically recognized and accepted by Federal law. Further, it is the Petitioner's position that such a stance cannot be upheld due to an express *statutory* provision of the Magnuson Act. This national standard under the Act provides that "conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocations shall be (A) fair and equitable to all such fishermen . . . " 16 U.S.C. §1851(a)(4). A Federal regulatory agency has no more power than a State to contravene the express directives and purpose of an Act of Congress.

Federal Pre-emption

The resolution of this matter rests on constitutional privileges which are so universally accepted in this Country that little or no cited authority should be necessary to affirm such principles. The Federal government, through the passage of the Magnuson Fishery Conservation and Management Act, assumed *exclusive* management authority over all fishery resources within the Fishery Conservation Zone of the United States. Because Congress's policy, as stated in the Magnuson Act, was to "assure that

the National Fishery Conservation and Management Program utilizes, and is based upon, the best scientific information available . . . " 16 U.S.C. §1801(c)(3), it logically follows that a fishery management plan will *not* be instituted for a fishery when the Federal government sees no need to regulate said fishery. The cases which stand for the proposition that a State may continue to regulate fisheries outside of its territorial waters until conflicting Federal regulations are implemented, i.e.; *Livings v. Davis*, 465 So.2d 507 (Fla. 1985); *State of Alaska v. F/V "Baranof"*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980), seem to improperly ignore the plain language of the Magnuson Act itself. There seems to have been a failure to research the Legislative history in order to glean the true Legislative purpose behind the Act.

The Legislative history of the Magnuson Act is particularly enlightening as to whether the Act was intended to pre-empt State regulation of "fisheries resources" (as opposed to regulation of State registered "fishing vessels" which is expressly allowed by 16 U.S.C. §1856(a)(3). The Committee Report on the Magnuson Act states in part:

> C. Federal Jurisdiction
>
> . . . there is also a sole Federal jurisdiction over the fishery resources found beyond the three (3) mile territorial sea and within the present twelve (12) mile limit to our fisheries economic zone. *In these waters, it is the Federal government which has the responsibility for whatever management of the fish stocks occur at all.*(emphasis supplied).

D. State Jurisdiction

> Under United States law, the biological resources within the territorial sea of the United States (i.e.; out to three (3) miles) are the management responsibility of the adjacent several states of the union. Whatever regulation *of both fishermen and fish harvest*, that occurs in this area is as deemed necessary and appropriate by each concerned State (emphasis supplied).

H.R. Rep. No. 445, 94th Cong., 2d Sess., *reprinted in* U.S. Code Cong. and Ad. News 593, 601 (1976). This language from the Legislative history of the Act defines the respective jurisdiction and regulatory authority of the Federal and State governments. With regard to the proposition that a fishery management plan or federal regulation must be in force and effect *before* a State is prohibited from regulating extraterritorial fishery resources, the Congressional report also sheds a good deal of light when it states:

> The committee is aware that there are other species of fish that will qualify as being depleted. The most obvious ones have been enumerated in this report. The committee expects the Secretary to carefully study those species of fish that may possibly fall within this definition and take the necessary steps to see that they receive proper management, as the results of improper management are reversible if appropriate action is taken in time.

H.R. Rep. 445, 94th Cong. 2d Sess., 224 *reprinted in* U.S. Code Cong. Ad. News, 593 at 1616 (1976).

The passage of the Magnuson Act *alone* should be held to have totally pre-empted State regulation of fisheries resources by the several states in the United States

Fishery Conservation Zone. Both the statutory and case law which placed management of extraterritorial fisheries resources under *exclusive* Federal control came about subsequent to the handing down by this Court of the decision in the case of *Skiriotes v. Florida*, 313 U.S. 69 (1941). The State Courts in *Livings*, *F/V "Baranof"*, and *Weeren*, *supra*, seem to have developed a "knee jerk" reaction to citing the *Skiriotes* case for the proposition that a State can continue to regulate its registered vessels (or citizens) extraterritorially as long as the regulation the State seeks to enforce does not conflict with Federal law. The blind reliance on the *Skiriotes* case, supra, in light of the passage of the Magnuson Act, has amounted, in many cases, to what could be considered *Affirmance by Rote*. Though the States are still allowed, by the Magnuson Act, to regulate their State registered vessels fishing vessels which journey beyond their boundaries, it is respectfully submitted that the regulation of the vessel must regard matters touching on the health, safety or welfare of the persons participating in the commercial fishing industry. The State law cannot seek continued extraterritorial management of a Federal fishery resource which, by Federal statutory law, is managed *exclusively* by the Federal government.

Should this Court reject the proposition that State extraterritorial enforcement of fishery management laws relating to a Federal fishery resource was not pre-empted by the passage of the Magnuson Act, then there surely cannot be *any* doubt that the Federal government pre-empted the field with regard to the red drum fishery in the Gulf of Mexico during the ninety (90) day period for which the red drum emergency rule was in effect. The

bottom line is that the Federal government, during the ninety (90) day emergency rule period, totally occupied the area of fishery management of red drum and restricted the previously unrestricted taking of red drum in the EEZ to one million pounds. The State of Florida, by enforcing the provisions of FLA. STAT. §370.08(3), attempted to disallow its citizens the right to take or possess red drum taken *pursuant to* and *in compliance with* the Federal rule. Florida's enforcement of §370.08(3), FLA. STAT., to red drum legally taken from the United States' Exclusive Economic Zone south of Louisiana amounts to a denial of equal protection, a denial of a privilege or immunity secured to all United States citizens by the United States Constitution and results in an *absolute* conflict with the Federal law and regulation. The State of Florida must not be allowed to preclude a United States citizen from participating, along with citizens from any other state in the Union, in the red drum fishery of the Exclusive Economic Zone of the United States. The issue is as basic and fundamental as common sense!

This Court has identified several different ways in which Federal law may supersede State law. As summarized in *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986):

> Pre-emption occurs when Congress in enacting a Federal statute expresses a clear intent to pre-empt State law, *Jones v. Rath Packing Company*, 430 U.S. 519 (1977), when there is *outright or actual conflict* between Federal and State, *E.G. v. Bland*, 369 U.S. 663 (1962), where compliance with both Federal and State law is, in effect, physically impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in Federal law a barrier to State

> regulation, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), where *Congress has legislated comprehensively*, thus *occupying* an *entire field* of regulation and leaving no room for the States to supplement Federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the *State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Heinz v. Davidowitz*, 312 U.S. 52 (1941) (emphasis supplied).

Louisiana Public Service Commission v. F.C.C., at 368, 369

This Court has repeatedly held that State laws can be pre-empted by Federal regulations as well as by Federal statutes. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 701, 713 (1985); *City of New York v. F.C.C.*, 486 U.S. 57 (1988); *Fidelity Federal Savings and Loan Assoc. v. Dayla Cuesta*, 458 U.S. 141 (1982) ("Federal regulations have no less pre-emptive effect than Federal statutes").

The passage of the Magnuson Act *did* evince a case wherein Congress has occupied a field so comprehensively that there is no room for State law to supplement Federal law. Indeed, Congress felt it proper to make a narrow exception to its comprehensive fishery management legislation by providing in 16 U.S.C. § 1856(a)(3), that a State may continue to *regulate* its State registered *fishing vessels* outside of State boundaries in the United States Exclusive Economic Zone. The words of the Magnuson Act and the Legislative history make it clear that continued State "regulation of a fishing vessel" does not refer to the *exclusive* Federal fishery management regulatory authority. Both the Magnuson Act, 16 U.S.C § 1802, and the emergency rule as to the red drum fishery of the

Gulf of Mexico, 50 C.F.R. § 653.2, define the terms "fish" and "fishing", independently. The expressed language of the original legislation, 16 U.S.C. § 1812, provides, *with no exceptions*, that the United States shall exercise *exclusive fishery management* over *all fish* within the United States Exclusive Economic Zone. The Petitioner contends that the Magnuson Act *by itself* has pre-empted the field of the taking of fish (*i.e.* fishery management) within the United States EEZ. Should a State attempt to regulate fishery management, *i.e.* the actual taking of fish, within the Exclusive Economic Zone, then an actual conflict arises between State law and an Act of Congress and Federal regulations adopted thereunder.

Should this Court determine that there is no pre-emption of the methods of actually taking Federal fishery resources *solely* by the passage of Magnuson Act, there was certainly preemption by the enactment of the emergency rule. Even within state boundaries it is clear that "Congressional enactments that do not exclude all State legislation in the same field, nevertheless, override State laws with which they conflict." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). This Court must make it clear that once the Federal regulation of the taking of red drum was implemented under the Magnuson Act, the regulation, of necessity, prevailed over conflicting State law. *State v. Sterling*, 448 A.2d 785, 787 (R.I. 1982) ("at the time the alleged offenses occurred, however, Federal regulations governing the fishing of yellowtail flounder in the EEZ were in effect [and] Rhode Island, therefore had no authority to regulate, directly or indirectly, fishing of this species outside its boundaries in a manner inconsistent

with the Federal regulations"). In this case, the application of FLA. STAT. § 370.08(3) to red drum taken extraterritorially is pre-empted to the extent that it, in effect, prohibits the taking of red drum in a manner and by means *specifically validated* by the Federal fishery management rule, 50 C.F.R. § 653, et seq. In this case, the Florida Courts have, in effect, "allowed" the use of a purse seine on Federal foodfish by all U.S. fishermen *except* Florida citizens or vessels. In this case, there is a *clear* conflict between State and Federal law.

Further, pre-emption can occur "where the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress". *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 369. It is clear that the enforcement of FLA. STAT. § 370.08(3), with regard to red drum taken from the United States Exclusive Economic Zone, is an obstacle to the accomplishment and execution of the full objectives of the Magnuson Fishery Conservation and Management Act. One of the stated purposes of the Act is to "achieve and maintain, on a continuing basis, the optimum yield from each fishery . . . ". 16 U.S.C. § 1801(b)(3) & (4) (emphasis supplied).

In December of 1986, the Secretarial Fishery Management Plan for red drum was approved and implemented by the Federal government. Though implemented subsequent to the emergency rule which was in effect at the time material to this Petition, the language as contained in the Secretarial Fishery Management Plan is highly enlightening:

> [F]ish, lawfully harvested in the EEZ must be allowed to be possessed, landed, sold and transported to permit free and efficient access of the resource to the stream of commerce (National Standard 5), as well as to achieve optimum yield from the fishery by maximizing the greatest overall benefit of this resource to the Nation (National Standard 1).

Secretarial Management Plan for red drum at 14-2.

The Federal regulations passed at the end of 1986 likewise plainly stated that:

> The Federal government has a responsibility to manage fisheries in the EEZ. Nevertheless, State laws would effectively nullify Federal fishing regulations in the EEZ if States could prohibit not only the landing of fish caught in State waters, but the landing of fish legally caught in the EEZ under Federal regulations.

51 Fed. Reg. 46675-02 (1986).

Common sense tells us that supersession is legally necessary. The Secretary deemed that "it would not ordinarily be fair . . . to apply different rules to people fishing in the EEZ based solely upon their state of citizenship." 51 Fed. Reg. 46675-02 (1986). The legal principles sought to be addressed in this proceeding were expressly recognized by the implementing regulations stating that:

> "landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and *purse seines* are *exempt* from *State landing, possession* and sales laws."

51 Fed. Reg. 46675-02 (1986).

The Federal Fishery Management Plan for red drum was based on the best scientific information available. If

Florida disagreed with the emergency rule, its remedy was to have its representative on the Regional Council for the Gulf of Mexico try to convince the Secretary (or the Council) not to pass the emergency rule, or to pass an emergency rule disallowing purse seines in the taking of *any* red drum from the United States Exclusive Economic Zone. The Legislative history shows that the State interests in the EEZ fisheries were to be protected by giving the State's representation on the Regional Councils, *not* by allowing the States to extraterratorily enforce conflicting State fishery management statutes. *See* Legislative History 843-847 (Remarks of Rep. Legett), 94th Cong., 2d Sess. (1976).

Finally, allowing Florida to enforce, in the EEZ, (south of the State of Louisiana) a State fishery management law that conflicts with the Federal regulation in force at the time of the Petitioner's arrest, would defeat the Congressional desire to have a "*National program* for the conservation and management of the fishery resources" of the EEZ. 16 U.S.C § 1801(a)(6) (emphasis added). The states contribute input to the Federal Fishery Management programs through their representatives on the Federal Councils, but the Councils *and* the Secretary of Commerce determine what is best for the Federal fishery as a whole. Allowing each State to adopt and enforce *fishery management provisions* governing their own fishermen or State registered vessels in the EEZ would create an obstacle to the accomplishment of the goal of having a National program for management of Federal fishery resources. Further, the National program for fishery management resources could well be subverted by the input of the state representatives on Federal Regional

Councils. Because each coastal state is given a statutory membership on the fishery management council, 16 U.S.C. § 1852, the state representatives have resisted the adoption of specific plans in favor of continued State extraterritorial regulation.

Privileges and Immunities

Commercial fishing in the United States Exclusive Economic Zone is a privilege and immunity regulated and protected by the Federal Government. As was stated by this Court in the case of *Snowden v. Hughes*, 321 U.S. 1, *reh'g den.*, 321 U.S. 804 (1944); " . . . what is protected by the Fourteenth Amendment are those 'privileges and immunities' which owe their existence to the Federal government, its laws, and Constitution."

This Court concluded in the case of *Toomer v. Witsell*, 334 U.S. 385 (1948) that commercial shrimping " . . . like other common callings is *within* the purview of the privileges and immunities clause", *Id.* at 403. The *Toomer* case dealt with a scenario in which South Carolina was discriminating against citizens of other States with regard to the shrimp fishery within State waters. The instant case deals with a situation whereby a State discriminates against its own citizens by disallowing them privileges and immunities provided to all other United States citizens with regard to the efficient harvest of Federal fishery resources. Florida's case against Mr. Raffield is no less a violation of the Privilege and Immunities Clause than is the situation confronted by this Court in *Toomer*! As the clause itself states . . . "No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States . . . ". U.S. CONST. 14th Amend., § 1. In the case of *Baldwin v. Fish and Game Comm. of Montana,* 436 U.S. 371 (1978), this Court stated that "it was undoubtedly the object of the clause (Privileges or Immunities Clause) in question to place the citizens of each State upon the same footing with the citizens of other States so far as the advantages resulting from citizenship in those States are concerned . . . " *Id.* at 380, 381. It would be unconscionable to allow Louisiana, Alabama or Mississippi commercial fishermen to harvest red drum in the United States Exclusive Economic Zone (south of Louisiana) pursuant to the Federal red drum rule while allowing Florida's enforcement of its fishery management laws to deny the Petitioner the same federal *privilege* and *immunity.*

The Legislative history of the Magnuson Act makes it clear that Congress was specifically concerned about the protection of rights of the United States fishermen such as the Petitioner. "The committee made every effort to see that all segments of the U.S. Fishing Industry were protected, including those fishermen who fish off the coast of other Nations". H.R. Rep. No. 445, 94th Cong., 2d Sess., 224, *reprinted in* (1976) U.S. Code Cong. and Ad. News, 593, at 596. Congress specifically stated that the natural resources outside the territorial limits of the coastal states were to be treated as a *single uniformly regulated* federal resource for the benefit of *all* citizens of the United States without regard to citizenship or state of incorporation. 16 U.S.C. § 1851(4).

Under the Magnuson Act and the Federal rule promulgated thereunder, the Petitioner is the intended beneficiary of a Federal statutory scheme that was intended to

give all United States fishermen, who applied for and were granted a permit to fish pursuant to the Federal rule, the right to make use of Federally regulated amounts of the Federal fishery resources of the Exclusive Economic Zone. The violation of a Federal right that is implicit in a statute's language and structure, is as much a direct violation of a right as is a violation that is clearly set forth in the text of the statute. *See Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989). In the *Golden State Transit* case, *Id.*, this Court pointed out that pre-emption becomes a substantive right if the State law attempts to regulate conduct that is actually protected by Federal law. And *Toomer v. Witsell*, 334 U.S. 385 (1938), specifically holds that commercial fishing *is* within the purview of the Privileges and Immunities Clause and, therefore, "protected by Federal law". Because The Magnuson Act provides for exclusive federal management of the Federal fishery resources, there is definitely a substantive "federal right to fish" in the United States Exclusive Economic Zone. The State of Florida impermissably interfered with this Federal right by the arrest of the Petitioner and the seizure of his catch.

Equal Protection

When initially confronted with the language of FLA. STAT. § 370.08(3), it appears that we are dealing with a State statute that is facially neutral and, therefore, not capable of running afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, a law non-discriminatory on its face may be grossly discriminatory in its operation. *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Petitioner contends that

Florida's enforcement of § 370.08(3), FLA. STAT., as applied, and when read *in pari materia* with the State registered vessel exception of 16 U.S.C. § 1856(a)(3), divides United States citizens into two (2) classes; those who can use purse seines as allowed by the Federal regulation and those on Florida registered vessels who cannot use purse seines. Petitioner contends that such a classification is arbitrary, irrational and a violation of the Equal Protection Clause of the United States Constitution. Under the explicit terms of the Magnuson Act *and* the emergency rule itself, the State of Florida could not enforce the provisions of FLA. STAT. § 370.08(3) as to a vessel not registered under the laws of Florida or even, *arguendo,* to anyone not a citizen of the State of Florida (pursuant to *Skiriotes v. Florida*, 313 U.S. 69 [1941]). What is clear is that the vessels registered under the laws of Louisiana, Mississippi or Alabama were free to harvest red drum by purse seine in Federal waters south of Louisiana, immediately adjacent to the Petitioner, *with impunity.* If the fishermen on the other vessels were not citizens of the State of Florida they would be immune from prosecution under FLA. STAT. § 370.08(3) under *either* a State registered vessel exception argument or a *Skiriotes*-type argument. Such a result must not be tolerated.

The general rule is that Legislation is presumed to be valid and will be sustained against an equal protection attack if the classification drawn by the statute is rationally related to a legitimate State interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The State of Florida has no rational or legal basis for extraterritorial fishery management which treats its registered vessels or citizens any

differently than vessels or citizens from other states. The one million pound limit of red drum would have been taken from the Exclusive Economic Zone in the Gulf of Mexico whether the Petitioner was allowed to participate or not. Florida's enforcement of FLA. STAT. § 370.08(3) as to red drum caught with purse seine in the EEZ south of Louisiana did *nothing whatsoever* to protect the Florida red drum population! While Petitioner does not dispute that Florida would have the right to enforce the provisions of FLA. STAT. § 370.08(3) with regard to "food fish" taken *within* Florida's waters, it is respectfully submitted that to enforce the same provisions against Florida registered vessels or Florida citizens with regard to red drum taken from the United States Exclusive Economic Zone south of the State of Louisiana is a denial of the equal protection of Federal law (The Magnuson Act) as guaranteed by the United States Constitution.

Interstate Commerce

There can be no question that Florida's extraterritorial enforcement of § 370.08(3), FLA. STAT., is an impermissible burden on interstate commerce. In fact, the red drum caught in Federal waters off the coast of Louisiana were shipped in interstate commerce from Louisiana to Florida before they were confiscated and the Petitioner arrested. It is clear that the regulatory power of Congress over interstate commerce begins when the intercourse begins. *Carter v. Carter Coal Company*, 298 U.S. 239 (1936). Once a product crosses a State line *at any state of its movement to the ultimate consumer*, it is considered to be in interstate commerce. The fact that the product is delivered to a State for processing before being shipped out to

the ultimate consumers is irrelevant. *Maryland v. Louisiana,* 451 U.S. 725 (1981).

Clearly, a State may attempt to confine the consumption of its fish and game wholly within the State's limits. *Geer v. Connecticut,* 161 U.S. 519 (1896), but in this case we are *not* dealing with Florida's fish or game. In this case we are dealing with Federal fishery resources to which . . . "the State of Florida is not entitled to any interest . . . ". *United States v. Florida,* 425 U.S. at 793 (1975). When a State regulates the sending of products across State lines, there is commerce among the States as to which State intervention is subordinate to the Commerce Clause. *See Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928).

In the July 19, 1990, decision of the Florida Supreme Court there is dictum which indicates that the Petitioner could have been arrested even had he off-loaded and processed his red drum in Louisiana and had sent the processed fish to different areas of the nation. In this case, however, the Petitioner was charged with possession of "illegally taken" red drum once the fish were within the State of Florida. Under the facts of this case, the Petitioner, to avoid prosecution, would have had to process and ship the red drum in a State other than Florida. There is no doubt that his costs would have been materially increased due to the fact that he would not have been able to use his own storage and processing facilities in Florida. In this case, the enforcement of Florida's statutory scheme imposes an artificial rigidity on the economic pattern of the fishing industry. The Florida Court's decision would force persons in the position of the Petitioner to divert their business to states other than Florida or, if

the State was proceeding under the "taking of foodfish within or without" the waters of the State of Florida (as opposed to the "possession" provision), then it would force persons in the position of the Petitioner to use vessels registered in states other than Florida and crew members other than Florida citizens when harvesting Federal fishery resources.

The enforcement of the Florida purse seine law as to Federal fishery resources, of necessity, disadvantages Florida's commercial fishermen and fish processors. The enforcement of FLA. STAT. § 370.08(3) restricts the movement of legally caught red drum into the State of Florida and requires additional expense and processing outside of the State of Florida in order to avoid the statute's consequences. Such artificial rigidity on the economic pattern of the industry cannot stand a Commerce Clause attack according to this Court's opinion in *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948).

It is a general rule that a State statute which attempts to effectuate a legitimate public interest with *only incidental effects* on interstate commerce will be upheld, *unless* the burden imposed is clearly excessive in relation to the putative local benefit. In determining how far a statute will be allowed to burden interstate commerce, the Courts will examine the nature of the local interest involved and will also seek to determine if this interest could be promoted as well with a lesser impact on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1969).

In this case, the state can evince no argument which would show that the enforcement of the State statutory

scheme, as to fish taken extraterritorially by purse seine, would in any way "preserve or protect" the State red drum population. The allocated amount of Federal red drum in the Exclusive Economic Zone of the United States (specifically the red drum south of Louisiana) would be taken *irregardless* of Florida's enforcement of § 370.08(3), FLA. STAT. The State's attempt to enforce the provisions of state statutory law with regard to red drum taken by purse seine within the United States Exclusive Economic Zone is a violation of the Commerce Clause. The less restrictive application of the state statutory scheme to red drum taken only within State waters accomplishes the exact same results during the period of time that the emergency rule for the red drum fishery of the Gulf of Mexico was in force. 50 C.F.R. § 653, et seq.

This Court has repeatedly held that where the subject of a State statute is national in character and admits and requires uniformity of regulation, Congress alone can provide the needed regulation. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1972); *Cooley v. Board of Wardens*, 53 U.S. 299 (1931). It has been pointed out previously in this Petition that the main purpose of the Magnuson Act, 16 U.S.C. § 1801, et seq., was to provide a uniform and non-discriminatory *national program* of fishery management. In this case, Florida's enforcement of § 370.08(3), FLA. STAT. to the Federal fishery resources of the United States Exclusive Economic Zone runs afoul of congressional intent.

Due Process

Under requirements of Due Process, a State is free to adopt whatever economic policy may be reasonably

deemed to promote public welfare and to enforce legislation adapted to that purpose. However, these laws must have a reasonable relation to a proper legitimate purpose and be neither arbitrary nor discriminatory. *Nebbia v. New York*, 291 U.S. 502 (1934). In this case, the enforcement of FLA. STAT. § 370.08(3) to "food fish" taken by purse seine outside Florida's territorial waters, is not reasonably related to the legislative purpose for which FLA. STAT. § 370.08(3) was enacted. Florida's extraterritorial application to red drum caught south of Louisiana does not *in any way* protect Florida's red drum fishery. The one million pounds allowable catch of red drum which was in effect during the ninety (90) days while the Federal rule was in effect would have been taken *irregardless* of the manner in which Florida chose to enforce its laws. Even in the absence of the Federal red drum rule, it is clear that the State of Florida could not, even arguably, enforce the provisions of FLA. STAT. § 370.08(3), beyond State waters as to vessels registered under the laws of states other than Florida or as to persons who are not citizens of the State of Florida. In effect, Florida's extraterritorial enforcement had no effect other than to convict Petitioner of a crime and deprive him of his property.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NO. ___

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EUGENE RAFFIELD, Petitioner

vs.

STATE OF FLORIDA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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SUPREME COURT OF FLORIDA

No. 71,677

EUGENE RAFFIELD, et al.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondents.

[July 19, 1990]

KOGAN, J.

We have for review *State v. Raffield*, 515 So.2d 283 (Fla. 1st DCA 1987), which expressly declared valid subsection 370.08(3), Florida Statutes (1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Eugene Raffield, owner of a fish processing plant in Gulf County, Florida, received a federal permit to catch red fish in federal waters in the Gulf of Mexico. On July 1, 1986, the United States Fish and Wildlife Service notified the Florida Department of Natural Resources that Raffield may have violated Florida law by harvesting red fish using a purse seine. The fish were caught off the coast of Louisiana, landed at Venice, Louisiana, and taken to Port St. Joe, Florida. Subsequently, Raffield and several others were arrested in Florida for possessing fish caught in violation of section 370.08(3), Florida Statutes.

The statute provides in pertinent part: "No person may take fish within or without the waters of this state with a purse seine. . . . or have any food fish so taken in

his possession for sale or shipment." § 370.08(3), Fla. Stat. (1985).

Raffield filed a motion to dismiss the charges on grounds that the statute had been preempted by federal law, was unconstitutional and had been enforced in an arbitrary and capricious manner. The trial court granted the motion, but later was reversed by the First District. *Raffield*, 515 So.2d at 284.

On the question of preemption, we cannot agree with Raffield's argument that federal regulations affecting the red drum fishery have preempted Florida law. By their own terms, the rules do the opposite. The rules preamble states:

> The Secretary recognizes the conservation and management efforts of the coastal states in the Gulf of Mexico with regard to the red drum fishery. The Secretary desires to support those efforts through ths [sic] emergency action to the maximum extent permitted under the Magnuson [Fishery Conservation and Management] Act.[1] It is the intent of the Secretary to supplement the States' efforts to conserve red drum. *Therefore, the emergency rule does not supersede any State landing laws which apply to red drum.* For purposes of the emergency rule, a State landing law is a statute, regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State any red drum.

51 Fed. Reg. 23,553 (1986) (emphasis added). Implementing this statement of intent, the actual rules provide:

---

[1] *See* 16 U.S.C. § 1855(e)(1)(1988).

> (a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.
>
> . . . .
>
> (d) *These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.*

Id. at 23,554 (emphasis added).

The statute at issue today manifestly is a "State law which prohibits the landing or possession" of red drum caught with a purse seine. Thus, we find no preemption. If anything, the federal government has actively *encouraged* the efforts of the state to reduce the burden on the red drum fishery caused by the sudden popularity of "blackened redfish" and the resulting insatiable demand for commercial red drum. And as we stated in *Livings v. Davis*, 465 So.2d 507, 509 (Fla. 1985),

> the [Magnuson Act] makes no attempt to preempt the field, but in fact recognizes continued state jurisdiction over vessels registered under the laws of the various states.

Here, Florida's jurisdiction over Raffield and the red drum he caught in federal waters off Louisiana is plainly authorized by the federal officer charged with administering the Magnuson Act. 51 Fed. Reg. at 23,553-54. The interpretation of administrative officers with special expertise, who are charged to administer a law, are entitled to judicial deference and will be given great weight in the courts of Florida. *United States Gypsum Co. v. Green,*

110 So.2d 409 (Fla. 1959). Accordingly, we conclude that no preemption has occurred in this instance.

Our opinion in *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So.2d 1351 (Fla. 1984), does not dictate a different result. In *Southeastern Fisheries* we dealt exclusively with the issue of whether a law could be enforced outside the territorial limits of Florida in the absence of an express provision to that effect by the legislature. Here, the law is not being applied beyond the territorial limits of the state. Raffield is charged with illegal possession of certain red drum *within* Florida. Moreover, even if this statute could be construed as applying beyond the state's territorial limits, the legislature has expressly provided that the statute applies to fish taken "without the waters of this state with a purse seine." § 370.08(3), Fla. Stat. (1985). Accordingly, *Southeastern Fisheries* is readily distinguishable from the present case.

Next, Raffield contends that the statute violates due process and equal protection because it allegedly is vague and susceptible of more than one interpretation, and is enforced capriciously. However, we find insufficient evidence in the record to support these allegations within the facts of this case. Moreover, we agree with the district court's observation that the statute is sufficiently definite to apprise persons of common intelligence of the activities that are prohibited. *Raffield*, 515 So.2d at 286 (citing *Gardner v. Johnson*, 451 So.2d 477, 478-79 (Fla. 1984)). We also agree that Florida legitimately may regulate the conduct of its own citizens and residents without violating equal protection, even though similar regulations might

not exist in other states. *Id.* (citing *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941)).

Finally, Raffield argues that this statute violates the commerce clause. Art. I, § 8, cl. 2, U.S. Const. Initially, we will assume for the sake of argument that the statute at issue today is subject to a more demanding judicial scrutiny because it affirmatively impedes interstate commerce in red drum caught in a certain manner. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). Thus,

> the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id. (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

There is no doubt that the state has satisfied its burden as to the first prong of this test. Florida clearly has an interest in protecting fisheries that are a vital source of food for its residents, even though the fisheries lie beyond the territorial limits of the state. *Skiriotes v. State*, 313 U.S. 69 (1941); *Livings v. Davis*, 465 So.2d 507 (Fla. 1985); *State v. Millington*, 377 So.2d 685 (Fla. 1979).

We also conclude that the state has met its burden as to the second prong of the test. In this instance, the manifest intent underlying the statute is to protect food fish, including red drum, from the use of purse seines. This record discloses that purse seines are an extremely efficient method of fishing – in fact, so efficient that they have threatened to wipe out some species of commercial food fish. This statute is directed at this evil in the only possible way: It eliminates Florida as a market for food

fish obtained by using purse seines. We can conceive of no other "available nondiscriminatory means" that would achieve the state's purpose in this instance.

The fact that other states have not adopted similar legislation is not relevant to our inquiry today. Florida's extensive coastline historically has given it a special stake in fishing activities in the Gulf of Mexico and Atlantic Ocean. Fishing is a vitally important industry in this state's economy. Simultaneously, we must recognize that Florida is one of the most populous states in this region, thus resulting in special burdens on the food-fish industry. Because of Florida's unique position, the legislature legitimately has concluded that special conservation measures must be implemented to preserve the food-fish industry. Eliminating Florida as potential market for food fish harvested by purse seines is such a conservation measure.

We also must note that the statute at issue today does *not* prohibit the importation of food fish, including red drum, obtained from other means. Although this is obvious on the face of the statute, the point needs belaboring. Under current Florida law, red drum still may be sold in Florida, provided it has been harvested by lawful means other than the use of a purse seine. The only burden this statute places on interstate commerce is to require fishing concerns to harvest fish by means consistent with sound conservation, as determined by the Florida legislature. Moreover, the statute applies to resident and nonresident alike and confers no special benefit on Florida or out-of-state residents.

We thus conclude that, even under the most rigorous scrutiny conceivable applicable here, the statute does not violate the commerce clause. *See Maine*, 477 U.S. at 138. The result reached by the district court is approved.

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD, EHRLICH, BARKETT and GRIMES, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Statutory Validity

First District – Case No. BP-439

(Gulf County)

Kenneth G. Oertel and Segundo J. Fernandez of Oertel, Hoffman, Fernandez & Cole, P.A., Tallahassee, Florida,

for Petitioners

Robert A. Butterworth, Attorney General and Bradford L. Thomas, Assistant Attorney General, Tallahassee, Florida; and Tom Gardner, Executive Director, Department of Natural Resources and Charles R. McCoy, Assistant General Counsel, Tallahassee, Florida,

for Respondents

Karen Hope Yore, General Counsel, Tallahassee, Florida,

Amicus Curiae for Southeastern Fisheries Association, Inc.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, Appellant, vs. EUGENE RAFFIELD, et al., Appellees.	:	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED. CASE NO. BP-439

Opinion filed October 20, 1987.

An Appeal from the County Court for Gulf County. David L. Taunton, Judge.

Robert A. Butterworth, Attorney General; John W. Tiedemann and Bradford L. Thomas, Assistant Attorney Generals, Tallahassee; and Charles R. McCoy, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellant.

Kenneth G. Oertel, Oertel and Hoffman, Tallahassee, for Appellees.

ERVIN, J.

The State of Florida appeals a county court's order dismissing misdemeanor charges against Eugene Raffield, et al., on the grounds that the statute on which the charges were based, Section 370.08(3), Florida Statutes (1985), violates the due process provisions of the Florida and United States Constitutions and the commerce clause of the United States Constitution. We reverse, finding no constitutional infirmities.

Section 370.08(3) forbids the taking of "fish food within or without the waters of this state with [the use of] a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a

purse line is drawn. . . . " Section 370.08(3) also prohibits the possession of food fish so taken for sale or shipment. Violation of the statute is a misdemeanor.

The National Marine Fisheries Service on June 30, 1986 issued an emergency rule pursuant to the authority provided in Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act (16 U.S.C.A. § 1885(e)(1)), limiting the total harvest of red fish in the federal conservation zone to one million pounds during the 90-day period between June 25, 1986 and September 23, 1986. 51 Fed. Reg. 23,511 (1986) (to be codified at 50 C.F.R. § 653). The emergency rule established permitting requirements and required all fishing vessels to have on board federal observers.

Appellee, Eugene Raffield, the owner of a fish processing plant in Gulf County, Florida, received a federal permit pursuant to the emergency rule to catch red fish. On July 1, 1986, the United States Fish and Wildlife Service notified the Florida Department of Natural Resources that possible violations of section 370.08(3) had occurred, due to the taking of red fish by purse seine in a Florida registered vessel in federal waters off the coast of Louisiana. The fish were landed in Louisiana and then trucked to Port St. Joe, Florida, where appellee, Eugene Raffield, and several personnel who assisted in the trucking and processing of the fish were arrested at the site of the Raffield fish processing plant in Port St. Joe, Florida. Citations were issued, charging Eugene Raffield and Raffield Fisheries, Inc., with violating section 370.08(3) for possessing food fish (red drum) that were taken by illegal means (purse seine). Appellee filed a motion to dismiss the charges, arguing alternatively that section

370.08(3) had been preempted by federal law, is unconstitutional, and that its enforcement was carried out in an arbitrary, capricious and selective manner. A county court judge issued an order granting Raffield's motion to dismiss, finding the statute to be an unconstitutional violation of the due process provisions of the Florida and United States Constitutions, and a violation of the commerce clause of the United States Constitution.

I.

We first observe that the adoption of the Magnuson Fishery Conservation and Management Act by Congress did not preempt the right of the State of Florida to regulate commercial fishing outside the territorial limits of this state. *See Livings v. Davis*, 463 So.2d 507 (Fla. 1985) (the adoption of the Magnuson Act does not preempt the State of Florida from regulating state-registered vessels in the state's extraterritorial waters in the absence of a conflicting regulation implementing a federal plan managing the same fishery). *Accord Potter v. McCullers*, 505 So.2d 511 (Fla. 3d DCA 1987). In *Livings*, fishermen were arrested for violating a state statute prohibiting the taking or possession of small shrimp on March 31, April 13 and May 2, 1981, prior to the effective date of a federal management plan that was adopted for the shrimp fishery on May 20, 1981. The Florida Supreme Court ruled that before the adoption of the federal management plan, the Magnuson Act did not preempt state extraterritorial fishing regulations.

The instant case is similar to *Livings*. Appellees at bar were arrested for possession of red fish taken by purse

seine on July 16, 1986, in the state of Florida. At the time of appellees' arrest, the emergency interim rule then in effect, regarding the red fish harvest, specifically stated that it "does *not supersede* any state landing laws which apply to red drum." 51 Fed.Reg. 23,551, 23,553 (e.s.). The emergency interim rule went into effect June 25, 1986, and was the operative regulation when the charge offenses occurred. At that point in time,[1] there was no preemption of state regulation affecting the landing of red fish.

II.

We find also that the trial court erred in holding that section 360.08(3) violates the federal commerce clause in that we are unable to perceive that the statute's provisions involve any undue burden on interstate commerce. In *State v. Millington*, 377 So.2d 685, 688 (Fla. 1979), the Florida Supreme Court held that a statute banning the importation of undersized shrimp taken from outside the territorial limits of Florida was not an unconstitutional burden on interstate commerce, stating: "[T]o the extent that [the statute,] as it relates to possession of 'small shrimp'[,] may affect interstate or foreign commerce, we find that this result is purely incidental, indirect, and

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[1] The Commerce Department subsequently published a fishery management plan for the red drum fishery, effective December 24, 1986, which preempts state regulation of the red drum fishery. 51 Fed. Reg. 46,675 (1986) (to be codified at 50 CFR § 653). The final rule implementing the fishery management plan for the red drum fishery became effective October 16, 1987. 52 Fed. Reg. 34,918 (1987) (to be codified at 50 CFR § 653).

beyond the purpose of the legislation and does not invalidate the statute." *Millington* relied on *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936), which upheld a law banning the transportation of sardines from the high seas into the State of California for the manufacture of fish flour. The fish flour was made with the expectation that it would be sold and shipped in interstate commerce.

In our judgment the statute at issue is similar to the statutes challenged in *State v. Millington* and *Bayside Fish Flour Co. v. Gentry*, and any burden placed on interstate commerce by its operation is incidental to the primary, valid purpose of protecting the state's supply of food fish. *See also National Fishermen Producers Cooperative Society, Ltd. of Belize City v. State*, 503 So.2d 430 (Fla. 3d DCA 1987) (Florida regulations regarding possession of lobster tail, even when in interstate transit, are not such a burden on interstate commerce as to violate the commerce clause). In *National Fisherman*, the State of Florida was found to have a valid purpose in confiscating crawfish moving through the state in interstate commerce, even though the seafood was not destined to be marketed in Florida and the owner of the seafood was a foreign entity.

III.

The county court judge concluded also the statute was void for vagueness and violated the due process provisions of the United States and Florida constitutions, due to varying interpretations of the statute by officials from the Florida Marine Patrol. We disagree. If the statutory language is sufficiently clear, the fact that officials

placed different interpretations on the statute does not make the statute void for vagueness. "Small variances in the understanding of individual officers which could possibly be clarified on closer reading of the statute does not necessarily show vagueness. *Gardner v. Johnson*, 451 So.2d 477, 478 (Fla. 1984). "A statute must be definite enough to apprise a person of common intelligence of the activity sought to be proscribed." *Id.* Section 370.08(3) plainly states that "no person may take food fish within or without the waters of the state with a purse seine . . . , or have any food fish so taken in his possession for sale or shipment." In the case at bar the red fish were taken from federal waters off the coast of Louisiana and trucked to Florida. The statute bars the possession in Florida of such fish that were illegally taken by purse seine elsewhere. The behavior which is proscribed by the statute is clear and the statute is not unconstitutionally void for vagueness.

IV.

The county court also stated that there were equal protection problems with the statute, since apparently, it was his belief that there was selective enforcement of the statute against Florida citizens, and not others. We disagree. A statute which regulates the conduct of the citizens of Florida, either within or without the territorial limits of the state, does not violate equal protection. *See Skiriotes v. Florida*, 313 U.S. 69, 77, 61 S.Ct. 924, 929, 85 L.Ed. 1193, 1200 (1941). In *Skiriotes*, the Supreme Court held that a state may constitutionally govern the conduct of its citizens upon the high seas with respect to matters for which the state has a legitimate interest, provided

there is no conflict with acts of Congress. Skiriotes objected to enforcement of the state's prohibition on sponge diving in an area which he alleged was outside of the jurisdictional limits of the State of Florida. Similarly we find no violation of equal protection clause by the statute in question, as it regulates the taking of food fish by Florida citizens outside the territorial waters of the state in order to enforce a matter for which the state has a legitimate interest – the conservation of the fishery resource.

We therefore reverse the order of the county court granting appellee's motion to dismiss and declaring section 370.08(3) unconstitutional.

REVERSED and REMANDED for consistent proceedings.

SMITH, C.J., and BOOTH, J., CONCUR.

IN AND FOR THE
COUNTY COURT
GULF COUNTY,
FLORIDA.

Citations # 84832-A Fla.
Marine Patrols, etc.

In Ref: The Matter of
Seizure of
Perishable
Seafood Product

STATE OF FLORIDA

vs.

EUGENE RAFFIELD, et al.

_____/

ORDER GRANTING DEFENDANTS
MOTION TO DISMISS

UPON HEARING of Defendents' Motion to Dismiss and after being fully advised in the premises thereof the Court finds that the statute under which the Defendants are charged is unconstitutional. Florida Statutes Section 370.08(3) provides:

> (3) USE OF PURSE SEINES, GIL NETS, AND POUND NETS, ETC. No person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment. The provisions of this section shall not apply to shrimp nets or to pound nets or purse seines when used for the taking of tuna or menhaden fish only.

The basis for the Court finding this statute unconstitutional is two-fold. One, the statute violates state and federal due process constitutional provisions. Two, the statute also violates the commerce clause of the United States Constitution.

Rationale of Court's Findings

ONE, AS VIOLATING DUE PROCESS, consider the following: The statute plainly states in part that *"no person* may take food fish within or without the waters of the state with a purse seine . . . or have any food fish so taken in his possession for sale or shipment." The statute excepts only tuna or menhaden fish.

On its face, the statute seems clear enough, at first. However, the State admits that application of the statute is not quite so simple.

In its Response in Opposition to Motion to Dismiss, and Memorandum Supporting said Response, the State concedes that Section 306(a) of the Magnuson Act, 16 U.S.C. 1856(a), effectively prohibits regulation by the state of any fishing vessel outside the state's territorial waters *except such vessels that are registered in Florida.* Specifically, this section states:

> "No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state." 16 U.S.C. 1856(a), Section 306(a).

Furthermore, the State's Memorandum states, " . . . Florida is not arguing that its 'purse seine law' can now be enforced in federal waters." *Id.* p. 5.

However, when Florida Marine Patrol Deputy Director, Lieutenant Colonel Clifford S. Kidd was specifically asked when a violation of this statute would occur if a Florida resident in a Florida vessel were to fish for food fish with a purse seine outside the territorial waters of Florida, he answered, "It would be my impression that when they (fish) were caught with the purse seine." (Deposition of Clifford S. Kidd, taken on August 22, 1986 at page 73.)

The deposition continued:

> Question (by defense attorney) – "So the moment of catching, no matter where in the world they are caught, would be your interpretation as to when the violation occured?"
>
> Answer (by Mr. Kidd) – "Yes sir." *Id.* page 73.

When asked whether violation of the law would occur if a Florida resident in a non-Florida vessel used a purse seine to catch food fish in waters outside the territorial waters of the state, Mr. Kidd responded "I don't know." *Id.* page 74.

But, Florida Marine Patrol Director, Colonel Donald M. Ellingsen, in an effort to further clarify the statute states:

> "Well, I think there is two ways to look at that law. And one is if it's a Florida citizen or a Florida boat, I think Florida clearly has police power over that citizen. Another way is if the fish is one that is – I can't put my tongue on the right word, but a Florida particular species, particular to Florida, then I think we can regulate that species off our coastline, off of our shore, within or without our waters." (Deposition of

> Donald N. Ellingsen, taken on August 22, 1986 at page 13.

Ironically, the State's own lawyer concedes that both Lieutenant Colonel Kidd and Colonel Ellingsen are incorrect in their interpretation of the law. Attorney Charles R. McCoy, Assistant Legal Counsel for the Department of Natural Resources, in his *Response in Opposition to Motion to Dismiss, and Memorandum Supporting said Response* states:

> "At the outset, Florida is not arguing that its 'purse seine law' can now be enforced in federal waters." *Id.* page 5.

The reason for the state's concession is made clear in *Southeastern Fisheries Association, Inc. v. Livings*, slip opinion (S. D. Fla. 1983), the United States District Court stated:

> " . . . the state's application of Section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause."

It is not surprising that considering the understanding of the law of the Marine Patrol Director and Deputy Director as of August 22, 1986 (the date of their depositions) that on July 16, 1986 the Defendants in this case were arrested. However, by the time of arguing against Defendants' *Motion to Dismiss*, counsel for the State, although acknowledging the Director and Deputy Director's misinterpretation of the law, attempted to salvage enough of the statute to maintain charges against all the

Defendants. Attorney for the State, Charles McCoy contended that a "savings clause" in the June 25, 1986 emergency regulation promulgated by the United States Department of Commerce allowed the latter portion of Florida Statutes 370.08(3) to remain intact. Basically the State's contention then became that merely having "any food fish so taken (by purse seine) in his possession for sale or shipment" constituted the alleged violation against all the Defendants.

However, three days later, with this decision yet pending, the local State Attorney's office formally announced to the Court dismissal of charges against all the Defendants except CARL EUGENE RAFFIELD and RAFFIELD FISHERIES, INC., adding yet another twist to the understanding of this law as follows:

> "The reason for this dismissal as to these individuals is:
>
> Florida Statute 370.08(3), possession of food fish for sale or shipment taken by purse seine, requires proof beyond a reasonable doubt that the offender knew the food fish so possessed for sale or shipment were taken by purse seine or other prohibited means.
>
> We cannot meet this burden of proof as to the employees of Raffield Fisheries any more than we could meet this burden of proof against a food store, convenience store, or fastfood establishment." (Letter addressed to the Court from the Office of the State Attorney, Fourteenth Judicial Circuit of Florida, dated September 18, 1986.)

Due process requires that a statute not be so vague as to necessitate persons of ordinary intelligence to guess at

its meaning and differ as to its application. *Marrs v. State of Florida*, 413 So. 2d 774, 775 (Fla. 1st DCA 1982).

Upon deposition, Lieutenant Colonel Clifford S. Kidd, who acknowledged that he was in charge of all (Marine Patrol) law enforcement (Deposition of Kidd, August 22, 1986, p. 4), when given four hypothetical, factual situations and asked whether each would be a violation of Florida Statute 370.08(3) responded as follows:

"I would assume so." *Id.*, p. 73, line 11.

"I don't know." *Id.*, p. 74, line 3.

"Not that I am aware of." *Id.*, p. 74, line 12.

"I would assume yes." *Id.*, p. 74, line 6.

Furthermore, in accordance with Lieutenant Colonel Kidd's understanding of the law, that the violation occurred at the time of the catching (seizing of the fish), those aboard the fishing boats should have been arrested if they were Florida residents in a Florida vessel. However, if they were Florida residents but not in a Florida vessel, he did not know if they were violating the law. (Note: none of the fisherman were arrested.)

But then, lieutenant Colonel Kidd's superior, Colonel Donald N. Ellingsen, Director of the Florida Marine Patrol, according to his understanding of the law, either Florida residency or being on a Florida vessel, at the time of catching the fish would have been sufficient to constitute the violation and evoke the arrest powers of the State.

Then comes Attorney Charles R. McCoy, Assistant Legal Counsel for the Department of Natural Resources

and differs with both the Director and Deputy Director of the Marine Patrol. He contends that neither the fishermen (Florida residency) nor the boat (Florida registered vessel) mattered. Instead, it was the transporting and possession of the fish in the State of Florida that constituted the crime. Consequently, the truck drivers and certain personnel of RAFFIELD FISHERIES, INC. were arrested.

However, not all the truck drivers were arrested. Yet another Marine Patrol officer made the determination that a Louisiana truck driver who committed the same acts as the arrested truck drivers should not be charged because, "He didn't know it was a violation, and he didn't work for the company, and he was just hauling the load", (Deposition of Kidd, August 22, 1986, p. 61, lines 19, 20) apparently adding yet another twist to the State's interpretation of the law.

Finally, along came the State's Attorney and differs with all the State's men and proclaims that only CARL EUGENE RAFFIELD and RAFFIELD FISHERIES, INC., were in violation of the statute.

Again, due process requires that a statute not be so vague as to necessitate persons of ordinary intelligence to guess at its meaning and differ as to its application. *Marrs v. State of Florida*, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

Assuming these (above mentioned individuals) are "persons of ordinary intelligence, (which no doubt they are) it is obvious that they guessed at the statute's meaning and differed as to its application. Consequently, the Court hereby declares Florida Statutes 370.08(3) to be unconstitutional in that it violates State and Federal due process constitutional provisions.

If, by any stretch of the Court's legal imagination this statute could withstand the constitutional muster of due process, passing the vagueness test, there would yet remain serious concerns as to the issues of equal protection, and violation of the Commerce Clause.

Two, as violating the Commerce Clause, consider the following:

The fact is that the National Marine Fisheries Services (NMFS) of the United States Department of Commerce, in June of 1986, issued an emergency rule allowing for a new harvest of one million pounds of red drum from the fishery conservation zone (FRZ) within a period not to exceed 90 days. The rule stated in part:

> "To safeguard the red drum resource from over exploitation, the Secretary is issuing this emergency interim rule. This rule limits the total directed net harvest of red drum from the FTZ to one million pounds for the 90-day effective period. . . . When the one million pound limit is reached or projected to be reached, all directed net fishing for red drum in the Gulf of Mexico will be prohibited.
>
> This restriction results in a substantial limitation on red drum harvest. There is no credible scientific evidence to support the conclusion that more restrictive limitations in the FCZ are warranted at this time." 50 CFR Part 653, Docket No. 60617-6117.

RAFFIELD FISHERIES, INC.'s boat, "Fisherman's Pride", along with a number of other boats from various states, was issued a permit to participate in the designated catch. When the one million pound limit was

reached the netting was stopped. Not one pound of additional red fish was netted due to the role of RAFFIELD FISHERIES, INC. in this operation! The one million pounds would have been caught with or without RAFFIELD's participation. Consequently, in no way did RAFFIELD in the alleged violation further diminish the red fish population of the Gulf of Mexico, not even by one fish.

Furthermore, consider the rationale of the United States District Court in *Southeastern Fisheries Association, Inc. v. Livings*, slip opinion (S. D. Fla. 1983) (Order Granting Plaintiff's Motion for temporary Restraining Order) which effectively declared Florida Statute 370.08(3) unconstitutional as applied to out-of-state vessels, stating that any such application would "constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause." *Id.*, page 6.

The Court continued:

> "On the other hand, it is neither fair nor equitable to allow boats registered in other states to reap the benefits the Act opens to them when Florida vessels are prohibited from the same conduct. Since congress has permitted the use of purse seines in the FCZ by all vessels, Florida may not now prohibit its citizens' vessels from engaging in the type of fishing congress has specifically allowed without violating the Plaintiffs' (and other Florida citizens') rights to equal protection." *Id.*, pages 6,7.

Basically, the Court is arguing that Florida citizens should benefit as any citizen of any other state from such catches as that at issue. To deny RAFFIELD FISHERIES, INC. the right to any and all benefits bestowed upon

citizens of other states would seem to violate the intent of the Commerce Clause. One such benefit would be processing and sale of the fish.

Those fish (one million pounds) were to be caught by someone. They had to be processed somewhere. Why should a Florida fishery (specifically, RAFFIELD) be denied participation in the economic benefits therefrom? The State argues:

> "The statute in question does not impair, prohibit, or interfere with Defendants' (RAFFIELD'S) movement in interstate commerce or the movement of Defendants' product in interstate commerce." (*State's Response in Opposition To Motion to Dismiss and Memorandum Supporting said Response*, page 8).

Except for the statute at issue, RAFFIELD would have been allowed to legally participate in, and economically benefit from the *catching and processing* of those fish. The insistence by the State that a "savings clause" in the United States Department of Commerce emergency regulation (codified at 50 CFR, Part 653) salvages the possession portion of the statute is without merit in that the application of that portion of the statute would deny a Florida fishery from benefiting from processing the fish, violating the Commerce Clause.

The State points out that recently the United States Supreme Court, in *Maine v. Taylor*, ___ U.S. ___, 106 S. Ct. 2440, 91 L.Ed. 2d 110 (1986) sustained a Commerce Clause attack on a Maine statute placing severe restrictions on "importing" baitfish. In that case the Court stated that the "Commerce Clause" cannot be read as requiring the State

of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences." *Id.*, 91 L. Ed. 2d at 127. The Court reasoned that Maine had a legitimate local purpose of protecting the State's fisheries from parasites and nonnative species that may be in shipments of live baitfish.

There is no such legitimate local purpose or no similiar crisis in the instant case. The fish were legally caught, even with a federal observer on board. No further depletion of red fish resulted in those fish being transported to Florida for processing, since they had to be processed somewhere. Transportation to Florida meant more jobs for Florida citizens.

THEREFORE, the Court finds Florida Statute 370.08(3) to be unconstitutional in that it violates the Commerce Clause.

In conclusion, it is difficult for the Court to understand what legitimate purpose the State could have hoped to serve by pursuing this matter. It appears that they may have been more interested in netting the fisherman than in the netting of fish.

FURTHERMORE, it concerns the Court that for the same act one governmental agency (United States Department of Commerce) encourages by issuing a permit (#RD-001) and compliments a citizen for his participation (letter from Department of Commerce official, Andrew J. Kemmer to "Fishermans Pride" Captain, Ricky Lancaster, dated July 21, 1986), another government agency (Florida Marine Patrol) condemns that act and arrest those who participated. This is a sad state of affairs.

The court hereby grants Defendants' *Motion to Dismiss* and orders that any bond obligation relative to this case be dissolved.

DONE AND ORDERED this 25th day of September, 1986.

/s/ David L. Taunton
DAVID L. TAUNTON
GULF COUNTY JUDGE

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

PROVISION OF THE UNITED STATES CONSTITUTION INVOLVED

1.] The U. S. Constitution, Article I, Section 8[3], commonly referred to as the Commerce Clause, provides that:

Section 8. [3] [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2.] The U. S. Constitution, Article IV, Section 2[1], commonly referred to as The Privileges and Immunities Clause, provides that:

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

3.] The U. S. Constitution, Article VI [2], commonly referred to as The Supremacy Clause, provides that:

[2] This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

4.] The U. S. Constitution, Amendment XIV, Section 1, commonly referred to as The Privileges and Immunities Clause, The Due Process Clause, and The Equal Protection Clause, provides that:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTORY LAW INVOLVED

5.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801, provide as follows:

(a) Findings

The Congress finds and declares the following:

* * *

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(b) Purposes

It is therefore declared to be the purposes of the Congress in this chapter –

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

* * *

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States;

(c) Policy

It is further declared to be the policy of the Congress in this chapter –

* * *

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

6.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1812, provide as follows:

Exclusive Fishery Management Authority

The United States shall exercise Exclusive Fishery Management Authority, and the manner provided for in this Chapter, over the following:

(1) all fish within the fishery conservation zone.

7.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1851, provide the following:

(a) In General

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid necessary duplication.

8.] The relevant portion of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1852, provides as follows:

(a) Establishment

There shall be established, within 120 days after April 13, 1976, eight (8) Regional Fishery Management Councils, as follows:

(5) Gulf Council

The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

9.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1855, provide as follows:

(e) Emergency Actions

(1) If the Secretary finds that an emergency exists involving any fishery, he may promulgate emergency regulations necessary to address the emergency, without regard to whether a fishery management plan exists for such fishery.

(2) If a Council finds that an emergency exists involving any fishery within its jurisdiction, whether or not a fishery management plan exists for such fishery –

(A) the Secretary shall promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by unanimous vote of the members who are voting members, requests the taking of such action; and

(B) the Secretary may promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by less than a unanimous vote, requests the taking of such action.

1856.

10.] The relevant portion of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856, provides that:

State Jurisdiction

(3) Except as otherwise provided by paragraph (2), a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

FEDERAL REGULATIONS INVOLVED

11.] The relevant portions of 50 C.F.R. §653, Docket No. 60617-6117, provide as follows:

Drum Fishery of the Gulf of Mexico

Summary:

NOAA issued an emergency interim Rule for the Management and Conservation of the Drum Fishery of the Gulf of Mexico. The Rule (1) limits the total directed net harvest of red drum from the fishery conservation zone to one million pounds, (2) establishes permit requirements and on board observer needs for vessels conducting directed net fishing for red drum, (3) specifies reporting requirements for owners or operators of vessels engaged in directed net fisheries for red drum, for spotter aircraft pilots, and for net vessels with an incidental catch of red drum, and (4) provides for closure of the red drum directed net fishery when the TDNH level has been reached. The intended effects of this Rule are to (1) recognize the concerns and efforts to the coastal states, to manage and conserve red drum and to support these efforts to the extent permitted by applicable Federal law, (2) prevent excessive taking of the resource until the Secretary of Commerce implements a Fishery Management Plan for the Drum Fishery, and (3) obtain the greatest amount of scientific information possible during the emergency period for use and preparation of a Secretarial plan.

Effective Dates:

For a period of ninety (90) days beginning 0001 hours, local time, June 25, 1986, through 2400 hours, local time, September 23, 1986, except for Section 653.4 and 653.5.

Supplementary Information:

Under Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), the Secretary of Commerce (Secretary), upon finding that an emergency exists involving any fishery, may promulgate emergency regulations deemed necessary to address that emergency. Those regulations may remain in effect for no more than ninety (90) days unless extended in accordance with Section 305(e)(1) of the Magnuson Act. The Secretary has determined that an emergency exists with regard to the red drum fishery of the Gulf of Mexico. Therefore NOAA issues this emergency interim rule implementing regulations deemed necessary to respond to the emergency.

Background:

Commercial fishing for red drum in the FCZ is conducted almost entirely with purse seines though other types of net gear may prove equally as effective. Purse seines, when deployed under the direction of spotter aircraft, have proven extremely efficient with catches of 50,000 pounds or more per set not uncommon and frequently range up to 150,000 pounds by some vessels.

Commercial net fishermen harvesting red drum in the Gulf of Mexico FCZ have a vested interest in this fishery. Because of limited information on the status of stocks; there exists a critical need for the fullest cooperation from the commercial sector to enable the acquisition of as much information as possible during the emergency period.

Regulatory Responses:

To safeguard the red drum resources from over exploitation, the Secretary is issuing this emergency interim rule. This rule limits the total directed net harvest of red drum from the FCZ to one million pounds for the 90-day effective period. This action greatly reduces the potential catch that could occur during this period and thus precludes possible excessive and destructive harvest. For example, two purse seine vessels harvested an average of 700,000 pounds of red drum monthly from January through May 1986. At this rate these two vessels could easily harvest in excess of 2.1 million pounds during a 90 day period. If all purse seine vessels actively fished during this period, their total harvest could reach 10 million pounds with proper market conditions. When the one million pound limit is reached or projected to be reached, all directed net fishing for red drum in the Gulf of Mexico FCZ will be prohibited.

This restriction results in a substantial limitation on red drum harvest. There is no credible scientific evidence to support the conclusion that more restrictive limitations in the FCZ are warranted at this time. The chosen total directed net harvest limit strikes a balance between the urgent need to conserve this valuable resource and the need to preserve the economic and social integrity of those interests, both recreational and commercial, that depend upon the resource. Information obtained during the pendency of this emergency rule will better enable preparation of a Secretarial plan to manage and conserve the resource and achieve optimum yield (OY) from the fishery.

§ 653.3 Relation to other laws.

(a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.

(b) Certain responsibilities relating to data collection and enforcement may be performed by authorized State personnel under a cooperative agreement entered into by the State, the U. S. Coast Guard, and the Secretary.

(c) These regulations apply within the boundaries of any national park, monument, or marine sanctuary in the Gulf of Mexico.

(d) These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.

§ 653.4 Permits and Fees.

(a) *Applicability.* Permits are required for all vessels fishing for red drum in the directed red drum net fishery in the FCZ. An application for a permit must be applied for by the owner or operator of such vessel on forms provided by the Regional Director. The owners and operators of vessels issued such permits must comply with the terms and conditions stated thereon.

12.] 51 Fed. Reg. 46675-02 (1986) provides in relevant part that:

* * *

The Federal Government has a responsibility to manage fisheries in the EEZ. Nevertheless, State laws would effectively nullify Federal fishing regulations in the EEZ if States could prohibit not only the landing of fish caught in State waters, but the landing of fish legally caught in the EEZ under Federal regulations.

It may become more difficult for States to enforce their landing laws if fish caught beyond State waters under a more liberal Federal regime can be landed. On the other hand, it would not ordinarily be fair, absent circumstances justifying such treatment, to apply different rules to people fishing in the EEZ based solely upon their State of citizenship. Inconsistent Federal and State regulations may legally exist in the EEZ and in State waters, but that is not usually the best way to regulate a fishery ranging over a wide geographical area. Experience in other fisheries has led to the conclusion that the best way to regulate is by Federal regulations and State regulations which are as similar as possible. When Federal regulations and State regulations are consistent, the question of conflict between Federal harvesting laws and State landing laws does not arise, the ability of each jurisdiction to enforce its laws is not diminished by problems of proving where the fish were caught. However, it is impossible to harmonize Federal law with the laws of each of the States on the Gulf of Mexico when these State laws differ significantly from each other. We will therefore continue to encourage that all the Gulf States adopt compatible regulations so that Federal and State regulations applicable to red drum could more easily be

harmonized throughout the Gulf. NOAA plans to continue to work with the States to that end.

Recognizing State conservation efforts and desiring to cooperate, NOAA decided that all landings except the incidental catch taken by gill nets, trammel nets, and purse seines should remain subject to State laws. Landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and purse seines are exempt from State landing, possession and sales laws. Vessels using such gear must provide six hours' advance notice of landing any incidental catch of the red drum and are subject to permitting and recordkeeping requirements. Because shrimp trawl vessels are excluded from the definitions of the directed and non-directed red drum fisheries, these vessels are exempt from the permitting and reporting requirements. Additional reporting and recordkeeping requirements for dealers and processors may be imposed by the States to ensure that only legally harvested fish move through commercial channels. If, as the result of further research, a directed commercial harvest quota is ultimately established, NOAA intends to cooperate with the States so that supersession of State laws with respect to the landing of the harvest of the directed fishery can be accomplished with the minimum of disruption of laws applicable to State waters.

STATE STATUTE INVOLVED

13.] FLA. STAT. §370.08(3) provides the following:

(3) Use of purse seines, gill nets, and pound nets, etc. – No person may take food fish within or without the waters of this State with a purse seine, purse gill net, or

other net using rings or other devices on the lead line thereof through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment.